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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 404

WISCONSIN ELECTRIC POWER COMPANY,
Appellant,

vs.

CITY OF MILWAUKEE, a Municipal Corporation,
Appellee.

STATEMENT AS TO JURISDICTION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

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CITY OF MILWAUKEE, a Municipal Corporation,
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STATEMENT AS TO JURISDICTION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

In compliance with Rule 15 of the Revised Rules of the Supreme Court of the United States, appellant submits herewith its statement as to the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Circuit Court for Milwaukee County and affirmed by the Supreme Court of the State of Wisconsin entered in this cause.

OPINIONS BELOW

The opinions of the Supreme Court of the State of Wisconsin in this cause are reported in 263 Wis. 111, 56 N.W. 2d 784, and 272 Wis. 575, 76 N.W. 2d 341. Copies of these opinions are attached hereto as Appendix "A".

JURISDICTION

Appellant's action seeks to have certain sections of the Charter of the appellee City of Milwaukee declared unconstitutional, and the special assessments levied pursuant thereto declared to be null and void. The decision of the Supreme Court of Wisconsin affirming the judgment of the Circuit Court for Milwaukee County (entered October 5, 1955) was entered on April 3, 1956, and on June 5, 1956, that court denied appellant's motion for rehearing which had been filed within the time allowed by Rule 37 of the Rules of the Supreme Court of Wisconsin (Section 251.37, Wisconsin Statutes). A notice of appeal to the Supreme Court of the United States was presented to the Supreme Court of Wisconsin on July 23, 1956. The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28 United States Code, Section 1257 (2). The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306; *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293; *Covey v. Town of Somers*, 351 U.S. 141.

STATUTES INVOLVED

Section 11.20 of the Charter of the City of Milwaukee (Chapter 184, Laws of Wisconsin of 1874, as amended

by Chapter 144, Laws of Wisconsin of 1875, and Chapter 388, Laws of Wisconsin of 1889), Section 12.07 of the Charter of the City of Milwaukee (Chapter 184, Laws of Wisconsin of 1874, as amended by Chapter 274, Laws of Wisconsin of 1881, and Chapter 324, Laws of Wisconsin of 1882), and Section 14.24 of the Charter of the City of Milwaukee (Chapter 184, Laws of Wisconsin of 1874). These Charter provisions all are set forth in Appendix "B" attached hereto.

QUESTION PRESENTED

Are notices of hearing of special assessments given by publication only by the City of Milwaukee, Wisconsin, pursuant to its charter, adequate to comply with the requirements of due process of law as provided in Article XIV, Section 1, of the Amendments to the Constitution of the United States, where the interests, names and addresses of the property owners affected by such special assessments were known by, in possession of, and readily available to said City?

STATEMENT

Appellant owns certain property in the City of Milwaukee, all of which is described in said City's tax key description as "R.O.W. EXEMPT". The appellant uses the property as a right of way for the sole purpose of distributing and transmitting electrical power through high tension wires. Appellee City of Milwaukee levied special assessments against the aforementioned property in 1949 and 1950 for paving, grading, installation of curbs, gutters, sidewalks, water pipes and sewers on certain streets adjacent to the aforementioned right of way.

The said right of way is a relatively narrow strip of land and is not suitable for other uses.

The appellee City purported to give appellant notice of said assessments by publishing notices in a publication in the City of Milwaukee known as The Daily Reporter, which notices were published by respondent in alleged compliance with Sections 11.20, 12.07 and 14.24 of its Charter. Appellant did not become aware of such assessments until the time for appeal from such assessments had expired.

Appellant then commenced an action in the Circuit Court for Milwaukee County, Wisconsin, to have said assessments be adjudged null and void, alleging the above facts in its complaint and further alleging that sections 11.20, 12.07 and 14.24 of the appellee's Charter are unconstitutional, for the reason that the notices of hearing by publication only as provided for by said sections are inadequate to comply with the requirements of due process of law. Appellant further alleged its interest in said property and its address and place of business were at all times herein well known to the appellee city; that the appellee city attempts to maintain records indicating the names and addresses of all property owners in the city of Milwaukee, which records are used by the appellee city to annually mail property tax bills to property owners in said city.

Appellant further alleged that its said property has not been made more accessible by the improvements made on the streets for which the assessments were made; that the property against which the said assessments have been made has not been benefited by such improvements.

The appellee city demurred generally to appellant's complaint and after a hearing the Circuit Court for

Milwaukee County sustained such demurrer. On appeal to the Supreme Court of Wisconsin from the order of the Circuit Court sustaining the demurrer, the Supreme Court affirmed the order by an equally divided court, and held as follows (*Wisconsin Electric Power Company vs. Milwaukee,* 263 Wis. 111, 112, 56 N.W. 2d 784):

> "*Per Curiam.* Mr. Justice Fairchild having taken no part in the decision upon this appeal, and the other members of the court being equally divided on the question whether the order sustaining the demurrer should be affirmed or reversed, Mr. Chief Justice Fritz, Mr. Justice Brown, and Mr. Justice Currie being of the opinion that the order should be reversed upon the ground that under the rule of Mullane v. Central Hanover B. & T. Co., 339 U.S. 306, 70 Sup. Ct. 652, 94 L. Ed. 865, the notices of hearing given by publication only as required by the provisions of the charter of the city of Milwaukee were inadequate to comply with the requirements of due process, and Mr. Justice Martin, Mr. Justice Broadfoot, and Mr. Justice Gehl being of the opposite view and that the order should be affirmed, the order is affirmed under the rule."

Subsequently appellant amended its complaint to set forth in detail the particular sections of the city's charter alleged to be unconstitutional, and further alleged that The Daily Reporter in which the appellee city's notices were published is a small business publication with a circulation of approximately 2000 copies, while the population of the City of Milwaukee in 1950 was 637,942, and that The Daily Reporter is not known of nor read by the vast majority of property owners in the city of Milwaukee.

The appellee city then demurred generally to appellant's amended complaint. After a hearing the Circuit

Court for Milwaukee County, Wisconsin, sustained the demurrer.

Appellee entered judgment in that Court upon the court order sustaining the demurrer. Appellant appealed to the Supreme Court of Wisconsin, and that Court affirmed the judgment of the Circuit Court for Milwaukee County sustaining appellee's demurrer to appellant's amended complaint. Copies of the judgment of the Circuit Court and the opinion of the Supreme Court of Wisconsin are appended hereto. (Appendix "C" and "A").

On June 5, 1956, the Supreme Court of Wisconsin denied appellant's motion for rehearing, which was filed timely with that court.

THE QUESTION IS SUBSTANTIAL

The issue involved in this appeal is similar to that raised in *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, and *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, relating to the insufficiency of notice by publication and is of importance to all property owners. In those cases the Court held that notice by publication can now only be justified where necessary. In *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, the late Mr. Justice Jackson stated this for the Court as follows (p. 318):

> "Where the names and post-office addresses of those affected by a proceeding are at hand, *the reasons disappear* for resort to means less likely than the mails to apprise them of its pendency." (Emphasis supplied)

In *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, the Court in a unanimous decision said (pp. 296, 297):

> "Section 77 (c) (8) of the Act states that 'The judge shall cause reasonable notice of the period in which claims may be filed, * * * by publication or otherwise.' 11 USC sec. 205 (c) (8). We hold that publication of the bar order in newspapers cannot be considered 'reasonable notice' to New York under the circumstances of this case.
>
> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L. ed. 865, 70 S. Ct. 652. But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication. See, e.g., Standard Oil Co. v. New Jersey, 341 U.S. 428, 95 L. ed. 1078, 71 S. Ct. 822. The case here is different. No such excuse existed to justify subjecting New York's claims to the hazard of forfeiture arising from 'constructive notice' by newspaper. * * *
>
> "The statutory command for notice embodies a basic principle of justice — that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York City has not been accorded that kind of notice."

In the *New York Case* New York City imposed liens on specific parcels of the railroad's real estate for street, sewer and other improvements. Reorganization of the railroad was begun in the Federal District Court. That court issued an order directing creditors to file their claims by a prescribed date. Copies of that order were mailed to creditors who had appeared in court. Other creditors had to depend for their notice on two once-a-week publications of the order in five daily newspapers,

one of which was the Wall Street Journal. New York City received no copy of the order and never filed its lien claims. The railroad then sued to have the city's lien claims declared unenforcible. The District Court and Court of Appeals held for the railroad. However on appeal to the Supreme Court of the United States that holding was reversed.

If a city is entitled to notice by mail before its lien claims based on special assessments are barred, it is submitted that then property owners should be entitled to the same protection at the time the city attempts to perfect its lien rights. Nevertheless, the Supreme Court of Wisconsin held that the appellee City of Milwaukee was only required to give notice of hearing of the special assessments by publication. The Court failed to state any reason why notice by publication was necessary in regard to hearings on special assessments, and appellant contends that there is no such reason.

No necessity exists which justifies notice by publication in the instant case. All that would be required of the city would be to mail copies of the special assessment notice to owners of property along the streets upon which the public improvement was contemplated. The city has the names and addresses of the property owners for it annually mails property tax bills to them.

Necessity is not proved by the fact that the legislature has sanctioned notice by publication of special assessments. The same argument was rejected by the Court in *Mullane v. Central Hanover B. & T. Co.,* 339 U.S. 306, 94 L. ed. 865. The courts, not the legislature, determine whether an Act is constitutional.

Nor is necessity shown by the fact that earlier authorities have recognized notice by publication as sufficient in special assessment proceedings. Law is a thing of growth which must never be blind to present day conditions. Mr. Chief Justice Warren stated this in *Brown v. Board of Education of Topeka,* 347 U.S. 483, as follows (pp. 492-493):

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."

The late Mr. Justice Jackson also considered present day conditions when he wrote for the Court in condemning notice by publication in *Mullane v. Central Hanover B. & T. Co.,* 339 U.S. 306, as follows (pp. 319-320):

> "In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects

> his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' McDonald v. Mabee, 243 U.S. 90, 61 L. ed. 609, 37 S. Ct. 343, LRA 1917F 458."

The above most certainly applies to a property owner as it does to an investor or a city. Special assessments are infrequent and, unlike general property taxes which are regularly assessed to raise money for public purposes, are to compensate for enhanced value of property because of improvement. *Illinois Central Railroad Co. v. City of Decatur,* 147 U.S. 190. Moreover, special assessments must benefit the property involved to be valid. Therefore, the right of a property owner to be informed of and to protest against a special assessment which does not benefit his property is a most substantial one.

The period of time which a property owner has in which to protect his rights is very short. For example, in the case of special assessments for street improvements notice by publication is given for four consecutive days, and within a few days thereafter the Common Council confirms the assessment. (See section 11.20, Charter of the City of Milwaukee, Appendix "B", page 19). Within twenty days from the date of confirmation the time for appeal expires and the property owner's rights have become completely barred. (See section 11.22 and section 11.23, Charter of the City of Milwaukee, Appendix "B", pages 22 and 23).

In the case of water pipe assessments the time in which to act is even shorter as the twenty day appeal period commences with the date of the last publication, there being no confirmation required by the Common Council.

(See section 14.24, Charter of the City of Milwaukee, Appendix "B", page 21).

Unless the property owner is informed by notice of the special assessment, he is not likely to know of the improvement until the work commences, which is some time after his appeal rights have gone, and he must then pay the assessment or eventually lose his property.

Unless a city gives notice, its jurisdiction to impose a special assessment is wanting. *Boden v. Lake,* 244 Wis. 215, 221, 12 N.W. 2d 140; *Pagni v. Commonwealth,* (1955) (Pa.) 116 A 2d 294. To allow a city to give notice by publication where it could give notice by mail, is to permit fiction to replace the truth and darkness, the light. It is the same as practically no notice at all in this day. Mr. Justice Holmes said in *Hyde v. United States,* 225 U.S. 347, 390:

> "The Constitution is not to be satisfied with a fiction."

In *Ochoa v. Hernandez Y. Morales,* 230 U.S. 139, Mr. Justice Pitney said (p. 161):

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

At least three members of the Supreme Court of Wisconsin recognized that the notices of hearing of special assessments given by publication only by the appellee City of Milwaukee were inadequate to comply with due process under the rule of the *Mullane* Case. *Wisconsin Electric Power Company v. Milwaukee,* 263 Wis. 111, 56 N.W. 2d 784.

CONCLUSION

It is submitted that the question presented by the appeal is substantial and is of public importance in view of the fact that the Supreme Court of Wisconsin has upheld notice of hearing of special assessments by publication only, where the interests, names and addresses of those affected by the special assessments were at all times known by, in the possession of, and readily available to the appellee City, and where no necessity has been shown to justify such notice by publication, all contrary to the holding of the Supreme Court of the United States in *Mullane v. Central Hanover B. & T. Co.,* 339 U.S. 306, and *New York v. New York, N. H. & H. R. Co.,* 344 U.S. 293. See also *Covey v. Town of Somers,* 351 U.S. 141.

Respectfully submitted,

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Appellant.

APPENDIX "A"

Opinions of the Supreme Court of the State of Wisconsin

First opinion, dated February 3, 1953, and reported in 263 Wis. 111, 56 N.W. 2d 784

STATE OF WISCONSIN — IN SUPREME COURT

August Term, 1952

No. 53

WISCONSIN ELECTRIC POWER COMPANY,

Appellant,

vs.

CITY OF MILWAUKEE, a municipal corporation,

Respondent.

APPEAL from an order of the circuit court for Milwaukee County, OTTO H. BREIDENBACH, circuit judge. *Affirmed.*

PER CURIAM: Mr. Justice Fairchild having taken no part in the decision upon this appeal, and the other members of the court being equally divided on the question whether the order sustaining the demurrer should be affirmed or reversed, Mr. Chief Justice Fritz, Mr. Justice Brown and Mr. Justice Currie being of the opinion that

the order should be reversed upon the ground that under the rule of *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 94 L. ed. 865 the notices of hearing given by publication only as required by the provisions of the charter of the city of Milwaukee were inadequate to comply with the requirements of due process, and Mr. Justice Martin, Mr. Justice Broadfoot and Mr. Justice Gehl being of the opposite view and that the order should be affirmed, the order is affirmed under the rule.

By the Court. — Order affirmed.

Second opinion of the Supreme Court of the State of Wisconsin

dated April 3, 1956, and reported in 272 Wis. 575, 76 N.W. 2d 341

No. 246

August Term, 1955

STATE OF WISCONSIN IN SUPREME COURT

Wisconsin Electric Power Co.,

Appellant,

vs.

City of Milwaukee, a municipal corporation,

Respondent.

APPEAL from a judgment of the circuit court for Milwaukee county: WILLIAM I. O'NEILL, Circuit Judge. *Affirmed.*

The trial court sustained a demurrer to plaintiff's amended complaint, after which, by judgment, it dismissed the action on the merits.

Plaintiff owned certain property in the city of Milwaukee abutting on streets which the city improved in various ways. The city levied assessments against the property for such improvements and, complying with the provisions of the city charter, gave notice by publication to the affected property owners. Plaintiff's original complaint alleged that its property was not benefited by the improvements; that it had no actual notice until it was too late to protest the assessments against its property;

and that the constructive notice by publication was inadequate to comply with the requirements of due process of law. The complaint demanded judgment, declaring unconstitutional the sections of the city charter which make such notice sufficient, and holding null and void the assessments levied pursuant to such notice. The city interposed a general demurrer which was sustained by the circuit court. Upon appeal the supreme court divided evenly which, perforce, resulted in an affirmance of the order sustaining the demurrer. This is reported in *Wisconsin Electric Power Co. v. Milwaukee* (1953), 263 Wis. 111, 56 N.W. (2d) 784. Subsequently a motion by appellant for rehearing was denied.

Upon remand plaintiff obtained leave of court to plead over and has now drawn and served an amended complaint to which the city has again demurred generally. The circuit court has again sustained the demurrer and has granted judgment dismissing the amended complaint upon the merits, and again the plaintiff has appealed.

BROWN, J. The amended complaint does not differ in any material respect from the original complaint, nor does appellant contend that it does. It presents to us the identical issue which we considered and determined in *Wisconsin Electric Power Co. v. Milwaukee* (1953), 263 Wis. 111, 56 N.W. (2d) 784. The reason for this appeal appears to be that since the first one the Supreme Court of the United States has considered once more the sufficiency of notice given by publication and in *New York v. New York, N. H. and H. Ry. Co.*, 344 U.S. 293, 97 L. Ed. 333, has affirmed and somewhat strengthened the principle it announced in *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 94 L. Ed. 865, (referred to

in our former opinion, 263 Wis. 111, 112) namely, that when more certain means of communication are reasonably available, notice by publication is insufficient to meet the demands of due process of law. In effect, appellant does no more than to ask us to reconsider, in the light of this more recent authority, our previous decision that the notice of special assessments given by the city by publication did not offend constitutional requirements.

For many years, beginning almost with the creation of this court, we adhered strictly to the principle that an issue once thoroughly considered and determined was settled for the purposes of the action in which the determination was reached, beyond the court's power to alter it. Then, in *McGovern v. Eckhart* (1929), 200 Wis. 64, 227 N.W. 300, the court, through Mr. Justice Eschweiler, exhaustively reviewed the earlier decisions bearing upon "the law of the case" and announced a departure from the former hard and fast rule, to-wit:

> "1. The rule of the 'law of the case,' as heretofore established and strictly followed in this jurisdiction, is now and for the future modified so as to permit the correction of error made by the supreme court on a former appeal in the same case whenever for cogent, substantial, and proper reasons the court is convinced that the prior ruling in the particular case ought not to stand as the law of that case and other cases." Headnote 1.

We have thus said that the application of the rule of "the law of the case" is discretionary with this court. We have not said that the rule is abolished, nor do our later decisions lead to that conclusion.

In *Pierner v. Mann* (1947), 251 Wis. 143, 28 N.W. (2d) 309, we said:

> "Appellants now urge that cases cited and relied upon by them were not distinguished in the former

> opinion and therefore ask that we again consider them. This is equivalent to asking for a rehearing on the former decision, which cannot be granted. That decision determined the law of the case and an extended opinion distinguishing cases relied upon by appellants would not change the result, as the ruling upon our first review was taken deliberately and considerately after a full examination of all cases cited by appellants * * * "

Even more recently, in *Pick Industries, Inc. v. Gebhard-Berghammer, Inc.* (1953), 264 Wis. 253, 59 N.W. (2d) 798, 60 N.W. (2d) 254, we said, p. 355:

> " * * * However, we feel this is a proper situation for application of the rule of the 'law of the case.' This court, having already determined on the prior appeal that the arbitration proceedings were statutory, Pick Industries, Inc., is thereby precluded on this appeal from again raising the same question * * * "

The question now presented to us for the third time in this action received thorough consideration upon the first appeal and the motion for rehearing. Under the circumstances, the decision automatically following from the equal division of the appellate court has little weight as a precedent in other cases; but a decision, even by a divided court, ought at some stage to attain stability for the duration of the action in which it was rendered. We think that stage was reached in the motion for rehearing the original appeal. We consider that when that motion was denied, the sufficiency of the published notice became the law of the case and the question is not to be repeatedly reargued and reconsidered in the subsequent stages of the litigation.

By the Court. — Judgment affirmed.

APPENDIX "B"

Applicable Provisions of the Charter of the City of Milwaukee

Section 11.20 (Chapter 184, Laws of Wisconsin of 1874, as amended by Chapter 144, Laws of Wisconsin of 1875 and Chapter 388, Laws of Wisconsin of 1889) — Paving assessment notice provisions —

> "As soon as any assessment of benefits or damages, or both, shall be made, as in the preceding sections of this chapter provided, the said commissioner shall give notice to all parties interested, by advertisement for not less than four days in the official papers of the said city, that such assessment has been made and is ready for inspection in his office, and that the same will be open for review and correction by the said commissioner, at his office, for not less than four days after the first publication of such notice during certain hours, not less than two hours of each lay day, and that all persons interested will be heard by said commissioner in objection to such assessment, and generally, in the matter of such review and correction. It shall be sufficient to state in such notice, in brief, what such assessment has been made for, and in what locality, and no further notice or publication of such assessment shall be necessary. During the time mentioned in such notice, the said commissioner shall hear objections and evidence, and he shall have power to review, modify and correct such assessment, in such manner as he shall deem just, at any time during such review, and for three days thereafter; and thereupon said commissioner shall endorse such corrected and completed assessment upon or annex the same to the estimate of the cost of such improvement, made and filed in his office, as provided in section 6, of this chapter, and shall file a duplicate of such estimate and assessment in the office of the city clerk, who shall lay the same before the common

council at its next meeting; and thereupon the common council may confirm or correct said assessments, or any of them, or may refer the same back to the commissioner of public works for revision and correction; and the said common council, and the said commissioner of public works shall respectively have the like powers, and perform the like duties, in relation to such assessment, and any subsequent assessment made pursuant to such reference by the common council, as are prescribed and conferred in relation to the first assessment."

Section 12.07 (Chapter 184, Laws of Wisconsin of 1874, as amended by Chapter 274, Laws of Wisconsin of 1881 and Chapter 324, Laws of Wisconsin of 1882) — Sewer assessment notice provisons —

"On or before the first day of March in each year, the commissioner of public works shall report to the common council the sewers necessary, in their judgment, to be built in each district, during the current year, in accordance with the plan, stating the precise location and extent of the same, and the kind of material of which they should be composed. The common council shall take such report into consideration, and may approve the same, and make such additions to it, or alterations in it in any respect as to them may seem best, and return the same to the commissioner, and it shall be the duty of the commissioner to carry out the work as directed in the report thus returned from the common council. The commissioner may also from time to time, during the year, as may be necessary, recommend to the common council the construction of other sewers than those contained in the general report, which recommendation the common council shall take into consideration and return to the commissioner approved, negatived or altered, as may to them seem best, and the commissioner shall carry out the work, as prescribed in the action of the common council;

provided, that said commissioner of public works shall, at least five days before the presentation of such recommendation to the common council, give notice by publication in the official paper or papers of the city, stating the day when such recommendation will be presented to the common council, and giving a general description of the proposed improvement and extension. Upon the presentation of such recommendation to said common council, with proper proof of publication of the notice above described, the same shall be referred to the appropriate committee, and consideerd and disposed of in the same manner and under the same rules, as are provided in the case of ordinances or resolutions creating a charge or liability against any city or ward fund; and provided further, that no sewer shall be built or contracted for by the commissioner until the same has been authorized or ordered by the common council."

Section 14.24 (Chapter 184, Laws of Wisconsin of 1874) — Water Pipe assessment notice provisions —

"The said commissioner of public works shall file reports of such assessments with the comptroller, who shall record the same in a book to be kept for that purpose, and give notice thereof to the parties interested, by publishing the same for three successive days in the official papers. Any person feeling himself aggrieved by the report of said commissioner, may, within twenty days after the completion of the publication of notice by the comptroller, appeal from such report to the circuit court of Milwaukee county. Such appeal shall be entered and conducted in like manner, and like security for costs shall be required as provided by law in cases of appeals from the decision of the common council of said city to said court, on the returns of assessment of benefits for street improvements. In making and signing of all reports or returns, under this chapter, by the said

commissioner of public works to the comptroller or any other officer of said city, the official signature of the commissioner shall be sufficient."

Section 11.22 (Chapter 184, Laws of Wisconsin of 1874, as amended by Chapters 297 and 494, Laws of Wisconsin of 1907).

"Appeals to Circuit Court; Damages, when paid. The owner of any lot, or tract of land, or tenement, who feels himself aggrieved by such assessment, as confirmed by the common council, as to the amount of benefits thereby adjudged to accrue to him by reason of any improvements charged against his lot or parcel of land, or the amount of damages, costs and charges, arising to such owner from an alteration of grade, may, within twenty days after such confirmation by the common council, appeal therefrom to the circuit court of Milwaukee county; and such appeal shall be taken, tried and determined, and bonds for costs shall be given, and costs awarded therein, in like manner as in cases of appeals to the said circuit court provided for in chapter six of this act. Such appeal shall not affect the rights of the contractor, or the proceedings in reference to his contract, but the certificate against the lot or parcel of land in question, shall be given as if no appeal had been taken; and in case the appellant shall succeed, the difference between the amount charged in the certificate and the amount of the benefit finally adjudged, shall be paid by the city out of the proper ward fund, to the appellant, but not until he shall have done the work in question, or have paid the certificate issued for doing the same. The amount assessed by the commissioner of public works, or finally adjudged on appeal, for damages, costs, and charges arising from an alteration of the grade, in excess of the amount charged against property deemed benefited, shall be paid by the city out of the proper ward fund, to the person or persons there-

to entitled, within one year after the confirmation of the assessment by the common council, or after final adjudgment therefor rendered by the court on appeal, as aforesaid; provided, that the time during which an appeal from such judgment may be pending in the supreme court shall not be deemed part of the year so limited."

Section 11.23 (Chapter 184, Laws of Wisconsin of 1874, as amended by Chapters 297 and 494, Laws of Wisconsin of 1907).

"*No action at law.* The appeal given by the last preceding section, from the assessment of the commissioner of public works, as confirmed by the common council, to the said circuit court, shall be the only remedy for the recovery of any damages, costs and charges arising from any alteration of grade by the said city, or sustained by reason of any proceedings or acts of the said city or its officers, in the matter to which such assessment of damages or benefits relates; and no action at law shall be maintained for such damages or injuries, whether arising from an alteration of grade or otherwise."

APPENDIX "C"

Judgment of the Circuit Court for
Milwaukee County, State of Wisconsin

STATE OF WISCONSIN

CIRCUIT COURT — MILWAUKEE COUNTY

Case No. 235-653

Wisconsin Electric Power Company,

Plaintiff,

vs.

City of Milwaukee, a
Municipal corporation,

Defendant.

JUDGMENT

This action coming on to be argued upon the demurrer of the defendant to the plaintiff's complaint, and the court having by an order made and entered on the 23rd day of September, 1955, sustained said demurrer, and the plaintiff not having requested leave to amend its complaint;

On motion of Ralph J. Chmurski, Assistant City Attorney, defendant's attorney;

IT IS ADJUDGED:

1. That the plaintiff's amended complaint herein be and the same is hereby dismissed upon the merits.

2. That the defendant, City of Milwaukee, recover of the plaintiff, Wisconsin Electric Power Company, the sum of One Hundred Dollars ($100.00) taxed and allowed as costs and disbursements in this action.

Dated at Milwaukee, Wisconsin, this 5th day of October, 1955, 2:45 P.M.

By the Court,

FRANCIS X. MCCORMACK,
Clerk.

By ROY J. DONOVAN,
Deputy Clerk

FILED
OCT 1 1956
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 404

WISCONSIN ELECTRIC
POWER COMPANY,

Appellant,

vs.

CITY OF MILWAUKEE,
a Municipal Corporation,

Appellee.

MOTION TO DISMISS

**Appeal from the Supreme Court
of the State of Wisconsin**

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 404

WISCONSIN ELECTRIC
POWER COMPANY,

Appellant,

vs.

CITY OF MILWAUKEE,
a Municipal Corporation,

Appellee.

MOTION TO DISMISS

Appeal from the Supreme Court
of the State of Wisconsin

The appellee, City of Milwaukee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal herein be dismissed on the grounds:

1. That there is no substantial federal question to be litigated;

2. That the federal question sought to be reviewed was not timely or properly raised or expressly passed on; and

3. That the judgment rests on an adequate non-federal basis.

QUESTION PRESENTED

Does direct appeal to the United States Supreme Court lie in reviewing a judgment based on a decision which decided only the question of whether or not the fact and legal situation was controlled by a previous case from the highest appellate court of that state?

STATEMENT

The City of Milwaukee, pursuant to the Laws of the State of Wisconsin, levied certain special assessments in 1949 and 1950 for the paving, grading and installation of curbs, gutters and sidewalks, water pipes and sewers on certain streets adjacent to the right-of-way owned by the appellant, which right-of-way is used at present for the transmission of electrical power.

The appellant felt itself aggrieved by such special assessments and raised certain questions as to the propriety of those assessments by taking a statutory appeal to the Circuit Court for Milwaukee County. The appellant attempted to raise certain constitutional questions, claiming that it was not notified properly of these assessments, since the notices were by publication only. The city demurred to this complaint and the demurrer was sustained by an order of the Circuit Court. Without pleading further, the appellant then appealed the order of the Circuit Court to the Supreme Court of the State of Wisconsin. The Supreme Court of Wisconsin, by an evenly divided court, one Justice abstaining, found for the defendant City of Milwaukee under the rule. The case was remanded for further proceedings at the Circuit Court level and the appellant then chose to amend its complaint. The city again demurred and the Circuit Court again upheld the demurrer of the city, holding that the

decision of the Supreme Court of Wisconsin on the original complaint was the law of the case and that appellant was merely attempting to have the court reconsider a matter which has been once considered and decided. The court neither decided nor raised any issues concerning the constitutionality of the assessments, nor any of the subsequent proceedings. Judgment was entered sustaining the demurrer and dismissing the amended complaint. The appellant then took its appeal to the Supreme Court of Wisconsin, and the Supreme Court of Wisconsin again affirmed the decision of the Circuit Court, holding that its previous decision was the law of this particular case in view of the fact that the parties were identical and the issues between them were the same.

The two opinions of the Wisconsin Supreme Court are found in the statement as to jurisdiction filed for the appellant on pages 13 through 18 thereof.

ARGUMENT

I.

No federal question nor any question involving the United States Constitution has been properly or timely raised or is before this court on the appeal presented by the appellant.

The appellant here seeks to review the judgment of the Circuit Court for Milwaukee County which was affirmed by the Supreme Court of the State of Wisconsin and reported in *Wisconsin Electric Power Co. v. Milwaukee,* 272 Wis. 575, 76 N.W. (2d) 341.

Neither the Circuit Court for Milwaukee County nor the Supreme Court of the State of Wisconsin resolved

any of the questions attempted to be raised by appellant relating to constitutionality. In the view of the case taken by the Wisconsin courts, there was no constitutional question, the only question being whether the appellant had its case fully litigated in a previous decision of the Supreme Court of the State of Wisconsin. Both the Circuit Court of Milwaukee County and the Supreme Court of Wisconsin held that the appellant had had its day in court and that the decision in *Wisconsin Electric Power Co. v. Milwaukee,* 263 Wis. 111, 56 N.W. (2d) 784, became the law of the case and that appellant in seeking to review it a second time was merely asking for reconsideration of the same issues. Consequently, the only question now before the Supreme Court of the United States is whether the fact situation discussed in the Supreme Court decision reported in *Wisconsin Electric Power Co. v. Milwaukee,* 272 Wis. 575, 76 N.W. (2d) 341, is governed by the previous decision of that court. Neither the Circuit Court for Milwaukee County nor the Supreme Court of the State of Wisconsin discussed any constitutional issue, nor was their decision based in any part upon an issue of constitutionality.

The Supreme Court of the United States has on a number of occasions held that in order to give the court jurisdiction it must appear affirmatively on the face of the record, not only that a federal question was raised, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case. *Matheson v. Branch Bank of Alabama,* 7 How 260, 12 L.Ed. 692; *Williams v. Kaiser,* 323 U.S. 471, 65 S. Ct. 363, 89 L.Ed. 398.

II.

The decision of the Wisconsin Supreme Court in affirming the judgment of the Circuit Court in and for Milwaukee County rests on an adequate non-federal basis.

The Supreme Court of the State of Wisconsin decided the case reported in *Wisconsin Electric Power Co. v. Milwaukee,* 272 Wis. 575, 76 N.W. (2d) 341, on the rule of the law of the case which prevails in Wisconsin and which was re-affirmed in *Wisconsin Electric Power Co. v. Milwaukee,* 272 Wis. 575, 76 N.W. (2d) 341.

The basic issue decided by the Supreme Court of the State of Wisconsin in *Wisconsin Electric Power Co. v. Milwaukee,* 272 Wis. 575, 76 N.W. (2d) 341, is that the appellant in again bringing the case before the Supreme Court was asking for reconsideration of a case which already had full consideration and which was decided by a previous decision of the Supreme Court. Nothing more could be said by this court or any other court in the United States which could lend more strength or virility to a decision of the highest appellate court of the State of Wisconsin, this being an issue which revolves around the case law prevailing in the State of Wisconsin. The case involves an application of the statutes of the State of Wisconsin and the procedures prevailing in Wisconsin as to appeals and reconsiderations and motions for rehearing. None of these questions have been given to the Congress of the United States for determination under the Constitution of the United States and, consequently, the Congress of the United States in setting up appeal procedures and a court system under the Constitution of the United States could not and has not given the United States Supreme Court jurisdiction to decide questions of this kind.

The Supreme Court of the United States has often denied requests to assume appellate jurisdiction where the case sought to be appealed is a case involving local or general law. See *Allen v. McVeigh,* 107 U.S. 433, 2 S.Ct. 558, 27 L.Ed. 572; *Manhattan L. Ins. Co. v. Cohen,* 234 U.S. 123, 34 S.Ct. 874, 58 L.Ed. 1245; *Ross v. Oregon,* 227 U.S. 150, 33 S.Ct. 220, 57 L.Ed. 458.

It has also been held by the United States Supreme Court that matters resting exclusively on state law are binding on the United States Supreme Court. *Williams v. Kaiser,* 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398; *Chesapeake & O. R. Co. v. Public Service Commission,* 242 U.S. 603, 37 S.Ct. 234, 61 L.Ed. 520; *United Gas Public Serv. Co. v. Texas,* 303 U.S. 123, 58 S.Ct. 483, 82 L.Ed. 702.

These are questions of state law, questions having their origin within the framework of many years of adjudications in the Supreme Court of the State of Wisconsin. Consequently, we feel that the decision by the Supreme Court of Wisconsin in *Wisconsin Electric Power Co. v. Milwaukee,* 272 Wis. 575, 76 N.W. (2d) 341, rests on an adequate and substantial non-federal basis which the Supreme Court of the United States should not and cannot interfere with.

CONCLUSION

It is submitted that the question presented by this motion to dismiss should be decided in favor of the appellee, City of Milwaukee, in view of the fact that the case rests on an adequate non-federal basis and because of the fact that no constitutional question is involved in the case presently pending before this court.

Respectfully submitted,

WALTER J. MATTISON,
City Attorney,

HARRY G. SLATER,
Deputy City Attorney,

EWALD L. MOERKE, JR.,
Assistant City Attorney,

Attorneys for City of Milwaukee,
a Municipal Corporation,
Appellee,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 404

WISCONSIN ELECTRIC POWER COMPANY,
Appellant,

vs.

CITY OF MILWAUKEE, a Municipal Corporation
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

In compliance with Rule 16 of the Revised Rules of the Supreme Court of the United States, appellant submits herewith its brief in opposition to the Motion to Dismiss filed by the appellee City of Milwaukee in this appeal.

QUESTION PRESENTED ON MOTION

Does the Supreme Court of the United States have jurisdiction to consider a substantial federal question determined by the Supreme Court of Wisconsin in affirming an order sustaining appellee's demurrer to appellant's

complaint where appellant then amends its complaint and appellee's demurrer to such amended complaint is sustained by the lower court upon which judgment is entered dismissing appellant's amended complaint and action, and on appellant's appeal to the Supreme Court of Wisconsin from such final judgment that court adheres to its decision on the first appeal as becoming the law of the case?

STATEMENT

A complete statement of the pertinent facts is set forth in appellant's Statement as to Jurisdiction previously filed with this Court in this appeal. In addition appellant wishes to point out that appellee's Statement in its Motion to Dismiss is not accurate or complete. Appellant did not, as there stated, take a statutory appeal to the Circuit Court for Milwaukee County from the special assessments levied by appellee against appellant's right of way. Appellant could not do this because it did not become aware of such assessments until the time for appeal from such assessments had run out, the notices of hearing of such assessments being given by publication only. Instead appellant commenced an action in the Circuit Court for Milwaukee County to have said assessments be adjudged null and void, alleging in its complaint that the notices of hearing of such assessments by publication only were inadequate to comply with the requirements of due process of law.

ARGUMENT

I.

The Supreme Court of the United States Has Jurisdiction to Consider the Substantial Federal Question Determined by the Supreme Court of Wisconsin on Appellant's First Appeal to That Court.

Appellee, City of Milwaukee, erroneously argues that the substantial federal question determined by the Supreme Court of Wisconsin on appellant's first appeal to that court from an order sustaining appellee's demurrer to appellant's complaint, which was reported in 263 Wis. 111, 56 N.W. 2d 784, is not properly before this Court because on appellant's second appeal to the Supreme Court of Wisconsin following the entry of judgment dismissing appellant's amended complaint and action after appellee's demurrer to said amended complaint was sustained by the lower court, the Supreme Court of Wisconsin adhered to its decision on the first appeal applying the rule of the law of the case. Appellee in effect contends that the Supreme Court of the United States does not have jurisdiction to consider the substantial federal question determined in the earlier stages of the litigation, but is restricted to a review only of such federal questions which were actually decided by the Supreme Court of Wisconsin on appellant's second appeal to that court. The complete answer to this contention is that the appellant could not have appealed to the Supreme Court of the United States from the decision of the Supreme Court of Wisconsin on the first appeal because that decision merely affirmed an order sustaining a demurrer which was not a "final" judgment or decree, one of the essentials for review by this Court. 28 USC § 1257. *Missouri & Kansas Interurban Railway Company v.*

City of Olathe, 222 US 185; *Clark v. City of Kansas City,* 172 US 334.

Being fully aware of this, appellant amended its complaint after the determination by the Supreme Court of Wisconsin on the first appeal, and, after appellee's demurrer to said amended complaint was sustained, appellant allowed a final judgment to be entered dismissing said amended complaint and its action upon the merits in the Circuit Court for Milwaukee County, which judgment the Supreme Court of Wisconsin affirmed on the second appeal. Appellant then invoked the jurisdiction of this Court as soon as the Supreme Court of Wisconsin denied appellant's motion for rehearing following the second appeal. Hence appellant appealed to this Court at the first opportunity open to it.

The record before this Court clearly demonstrates that appellant alleged that appellee's notices of hearing of special assessments by publication only were not adequate to comply with the requirements of due process of law in its initial pleading, and that appellant has consistently alleged such constitutional objection at all subsequent stages of the proceedings. The record also discloses that the Supreme Court of Wisconsin in its decision on the first appeal (263 Wis. 111, 56 NW 2d 784) expressly ruled on appellant's contention as follows:

> "*Per Curiam.* Mr. Justice Fairchild having taken no part in the decision upon this appeal, and the other members of the court being equally divided on the question whether the order sustaining the demurrer should be affirmed or reversed, Mr. Chief Justice Fritz, Mr. Justice Brown, and Mr. Justice Currie being of the opinion that the order should be reversed upon the ground that under the rule of Mullane v. Central Hanover B. & T. Co., 339 US 306, 70 Sup. Ct. 652, 94 L ed 865, the notices of

> hearing given by publication only as required by the provisions of the charter of the city of Milwaukee were inadequate to comply with the requirements of due process, and Mr. Justice Martin, Mr. Justice Broadfoot, and Mr. Justice Gehl being of the opposite view and that the order should be affirmed, the order is affirmed under the rule."

The Supreme Court of the United States is not deprived of its jurisdiction to consider this substantial federal question merely because on the second appeal the Supreme Court of Wisconsin applied the rule of the law of the case. If such were true a substantial federal question could be decided by a State Supreme Court in the earlier stages of the proceedings which could not be reviewed by the Supreme Court of the United States merely because the State Supreme Court would apply the law of the case to later determinations by it in the matter. This Court has repeatedly declared that such is not the law. Recently in *Reece v. Georgia* — US —, 100 L ed *109, Mr. Justice Clark speaking for the Court said (100 L ed *112):

> "At the outset the State contends that the case is not properly before us because petitioner did not apply for a writ of certiorari within 90 days after the first judgment of the Supreme Court of Georgia. This contention is clearly without substance. A timely application for certiorari to review the second judgment was made, and the case is properly here. 28 USC § 1257. We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, Urie v. Thompson, 337 US 163, 172, 173, 93 L ed 1282, 1293, 1294, 69 S Ct 1018, 11 ALR 2d 252, and our right to reexamine such questions is not affected by a ruling that the first decision of the state court became the law of the case, Davis v. O'Hara, 266 US 314, 69 L ed 303, 45 S Ct 104."

In *Urie v. Thompson,* 337 US 163, Mr. Justice Rutledge, speaking for the Court, said (pages 171-173):

"We may readily dispose of another preliminary question concerning the issues which are now properly before us. Respondent argues, somewhat surprisingly, that the sufficiency of petitioner's original claim for negligence involved in the first appeal is not properly here, since it was neither raised nor considered on the second appeal to the Missouri Supreme Court. The short answer is that petitioner has brought the claim to this Court at his first opportunity; and it was not necessary for him to relitigate that claim a second time through the state courts in order to preserve it for our consideration on review of the final judgment rendered in the cause.

"From the opinions of the state supreme court we know judicially that its judgment negating the general claim for negligence was coupled with its subsequently repudiated conclusion that petitioner had stated a cause of action under the Boiler Inspection Act and that, consequently, the court remanded the cause for trial, not for dismissal. The judgment therefore was not final; it was interlocutory and not reviewable here within the meaning of our jurisdictional statute. 28 USCA § 344(b) (now § 1257(3)).

"Although the Missouri Supreme Court's disposition of the first appeal precluded review here at that time of the ruling adverse to petitioner, Urie did not waive that question by amending his complaint, in conformity with the court's mandate, to state his claim more specifically in terms of the Boiler Inspection Act or by proceeding with trial on that theory. As the case then stood, this was his only remaining chance for success unless he was to waive it, ask for final judgment to be entered against him on the general negligence issue, and rely solely upon

securing review of that judgment and reversal by this Court.

"Whatever the effect of the state supreme court's ruling for further proceedings in the state courts, it could not impose such an alternative upon petitioner. Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review. Zeckendorf v. Steinfeld, 225 US 445, 454, 56 L ed 1156, 1162, 32 S Ct 728; Messenger v. Anderson, 225 US 436, 444, 56 L ed 1152, 1156, 32 S Ct 739. Even so, we think sound practice would see to it that such questions were expressly preserved in the later stages of review. But, as this Court has had occasion heretofore to observe, its power to probe issues disposed of on appeals prior to the one under review is, in the last analysis, a 'necessary correlative' of the rule which limits it to the examination of final judgments. Louisiana Nav. Co. v. Oyster Commission, 226 US 99, 102, 57 L ed 138, 140, 33 S Ct 78.[12]

(footnote 12) If it were otherwise, our corrective hand could be stayed by any local procedure which chose to resolve all substantial federal questions in an intermediate phase of litigation. The present case lends point to language used by this Court in dismissing a writ of error to a state court for lack of a final judgment: 'When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the (state) Supreme Court * * * as laying down the law of the case, this court will not be thus bound.' Grays Harbor Logging Co. v. Coats-Fordney Logging Co. (Washington

> ex rel. Grays Harbor Logging Co. v. Superior Court), 243 U.S. 251, 256, 257, 61 L ed 702, 705, 706, 37 S Ct 295. Accordingly, even if it were assumed that no federal question of substance was decided on the second appeal and that the 'basis for our jurisdiction must be found, if at all, in the decision and opinion of the state supreme court upon a prior appeal in the same case,' petitioner Urie has 'invoked the jurisdiction of this court at the first opportunity open to (him), and the federal question, having been considered by the state supreme court, is properly here.' Gant v. Oklahoma City, 289 US 98, 100, 77 L ed 1058, 1060, 53 S Ct 530. See, generally, Boskey, Finality of State Court Judgments under the Federal Judicial Code, 43 Col L Rev 1002, 1007, 1016."

See also *United States v. United States Smelting R. & M. Co.,* 339 US 186, 198, 199.

The cases cited by appellee in its Motion to Dismiss do not apply to this question.

CONCLUSION

The federal question on this appeal is substantial and of great importance. Appellant maintains that appellee's Motion to Dismiss should be denied because it is clearly without substance or merit.

Respectfully submitted,

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JOHN F. ZIMMERMANN,
JOHN G. QUALE,

Attorneys for Wisconsin Electric Power Company, Appellant.

No. 404. WISCONSIN ELECTRIC POWER CO. *v.* CITY OF MILWAUKEE. Appeal from the Supreme Court of Wisconsin. *Per Curiam:* In this case probable jurisdiction is noted. The judgment of the Supreme Court of Wisconsin is vacated and the case is remanded to the Circuit Court for Milwaukee County* for consideration in the light of *Walker* v. *City of Hutchinson*, 352 U. S. 112.

Van B. Wake and *John F. Zimmermann* for appellant. *Walter J. Mattison* and *Harry G. Slater* for appellee. Reported below: 272 Wis. 575, 76 N. W. 2d 341.